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No. 96-1393

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MISSOURI PACIFIC RAILROAD COMPANY/
UNION PACIFIC RAILROAD COMPANY,
Petitioners,

v.

CHARLES A. HARPER,
Respondent.

On Petition for a Writ of *Certiorari* to the Appellate Court of Illinois, Fifth District

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under Rule 37.2(b). Petitioners, Missouri Pacific Railroad Company and Union Pacific Railroad Company, have consented to AAR's filing of a brief.[1] Respondent, Charles A. Harper, has refused consent.

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR seeks to file a brief *amicus curiae* only when the case presents an issue of great significance to

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[1] The letter expressing consent has been filed with the Clerk of the Court.

the railroad industry as a whole—and in those instances such requests have been granted.[2]

This case, arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, presents such an issue. Commonly, attorneys representing FELA plaintiffs seek to interview employees of the defendant railroad without obtaining the consent of, or even advising, the railroad's counsel. This practice is in violation of state ethical rules prohibiting *ex parte* communications. While in some cases railroads have successfully challenged this practice, some courts have exempted plaintiffs' counsel from state ethical rules, holding that such rules are preempted by § 60 of FELA. This issue, which directly impacts a railroad's ability effectively to defend FELA suits, is one of increasing significance to the railroad industry.

When AAR appears before a court as *amicus curiae* in an FELA case it brings a broad, industry-wide perspective to the issue. This perspective often is different from that of the individual litigant, who may not be in a position fully to be aware of a case's impact on the industry as a whole.

Because of its long involvement with FELA, AAR is in an excellent position to address questions arising under that unique statute. AAR conducts an annual survey of the FELA experience of its member railroads, and compiles and maintains the results. This represents, to AAR's knowledge, the most comprehensive database on FELA costs and trends in existence.[3]

AAR works closely with its member roads' litigation counsel on problems associated with FELA. AAR also

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[2] *E.g.*, *Metro North Commuter R.R. v. Buckley*, 79 F.3d 1337, *cert. granted* Nov. 1, 1996; *Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330 (1988); *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987).

[3] *See* ASSOCIATION OF AMERICAN RAILROADS, CLAIM & LITIGATION REPORT (published annually).

maintains a close liaison with the National Association of Railroad Trial Counsel, a 1200 member organization of attorneys representing railroad companies in personal injury litigation. As a result, AAR is thoroughly familiar with the trends and problems associated with FELA.

AAR has spearheaded railroad industry legislative efforts to bring treatment of railroads in the area of employer liability into conformity with all other industries, which are covered by no-fault workers' compensation laws. During the course of these efforts, AAR has worked with the shortline and regional railroads, as well as the commuter authorities, all of whom are also governed by FELA, but whose perspectives may be somewhat different from the large freight roads which mostly constitute AAR's membership. Consequently, AAR has become familiar with the impact of FELA on all components of the rail industry.

AAR's primary interest with regard to FELA in the judicial arena is to prevent courts from expanding railroad liability beyond FELA's intent. While FELA is a unique statute, it does not impose boundless liability on railroads: except where it evidences a congressional intent to depart from the common law, liability is circumscribed by common law doctrines. Lower courts sometimes fail to appreciate this fact. Moreover, the problem is compounded by FELA's liberal venue provision, which affords plaintiffs wide latitude in selecting the site of litigation, as well as the ability to bring and maintain an action in state court. Thus, aberrant state court decisions can have a far reaching impact. So long as Congress continues to keep this regime in place, railroads will avail themselves of their legal rights in an effort to limit their liability, and AAR will support those efforts.

In this case, the lower court's ruling that the plaintiff's counsel was unconstrained by state ethical rules has a significant adverse impact on the defendant. Moreover, given the numerous railroads that do business in Illinois,

this decision, which is at odds with rulings of other courts, will impact a significant portion of the railroad industry, not just the individual railroad involved. In this case, as in others, AAR can play a valuable role in bringing the railroad industry's perspective to the Court's attention.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 77 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ 91 percent of rail employees. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest.

One such matter is the Federal Employers' Liability Act (FELA). In 1908, before enactment of any no-fault workers' compensation statutes in this country, Congress structured a tort-based remedy for railroad employees in-

jured on the job. Subsequently, every state has enacted a workers' compensation law, under which concepts of negligence have been eliminated and insurance-type benefits are provided to injured workers.[1]

Each year several thousand FELA lawsuits are filed against AAR members, and many more claims are settled before a suit is filed. In 1995, for example, 5,790 lawsuits were brought.[2] AAR's members expend substantial sums of money defending FELA claims, and paying out FELA settlements and verdicts—far more, by any reasonable standard of comparison, than is spent by other industries as compensation for work-related injuries.[3]

In the case below, the railroad sought to avail itself, through enforcement of the local rules of professional responsibility, of the same protection all represented corporate parties enjoy in litigation: the right to be advised of opposing counsel's desire to interview its employees about a matter in litigation and to be present at those interviews. The railroad was denied this protection by the trial court on the grounds that § 60 of FELA preempts any obligations imposed on plaintiff's counsel by

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[1] Seamen are covered under FELA by virtue of 46 U.S.C. § 688. All other industries in the United States are covered by either state or federal no-fault workers' compensation systems.

[2] ASSOCIATION OF AMERICAN RAILROADS, 1995 CLAIM & LITIGATION REPORT 3-3 (May 1996). (CLAIM AND LITIGATION REPORT). This report contains data on AAR member railroads' FELA experiences compiled from annual surveys.

[3] Private industry as a whole pays about $0.36 per employee hour worked under state workers' compensation, GENERAL ACCOUNTING OFFICE, INTERCITY PASSENGER RAIL: FINANCIAL AND OPERATING CONDITIONS THREATEN AMTRAK'S LONG-TERM VIABILITY 59 (1995), compared to nearly $2.00 for railroads. CLAIM & LITIGATION REPORT at 2-2. Over the past five years, railroads have spent, on average $1.2 billion on FELA annually, or nearly 3.7 percent of their gross revenues. CLAIM & LITIGATION REPORT, (Calendar years 1991, 1992, 1993, 1994 and 1995).

state ethical rules to refrain from making *ex parte* contacts. That ruling was affirmed by the court below.

The lower courts remain badly divided over this issue, which recurs frequently in FELA litigation.[4] In some FELA cases, through enforcement of state ethical rules, railroads have successfully prohibited plaintiffs' counsel from making *ex parte* contacts with employees of the company. However, in other cases courts have read § 60 as giving plaintiffs' counsel carte blanche to contact rail employees without notifying or seeking the consent of railroad counsel.

AAR members, and their counsel, have a strong interest in the resolution of this matter, which has a significant impact on their ability effectively to defend FELA cases.

STATEMENT OF THE CASE

Amicus adopts the statement of the case in Petitioners' brief.

SUMMARY OF THE ARGUMENT

The court below held that § 60 of FELA preempts state rules which prohibit attorneys from making *ex parte* contacts with represented parties, exempting FELA plaintiffs' counsel from the ethical standards that govern all other attorneys. The broad preemptive sweep given § 60 is unwarranted. The legislative history makes clear that Congress' intent in enacting § 60 was to eliminate certain

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[4] *Compare Tucker* v. *Norfolk & Western Ry.*, 849 F.Supp. 1096 (E.D. Va. 1994); *Branham* v. *Norfolk & Western Ry.*, 151 F.R.D. 67 (S.D. W.Va. 1993); *Queensberry* v. *Norfolk & Western Ry.*, 157 F.R.D. 21 (E.D. Va. 1993); *State ex rel. Atchison, Topeka & Santa Fe R.R.* v. *O'Malley*, 888 S.W.2d 760 (Mo. App. 1994) (holding that § 60 does not permit *ex parte* communications) with *Blasena* v. *Consolidated Rail Corp.*, 898 F.Supp. 282 (D.N.J. 1995); *United Transp. Union* v. *Metro-North Commuter R.R.*, 1995 U.S. Dist. LEXIS 15989 (S.D.N.Y. 1995); *Norfolk Southern Ry.* v. *Thompson*, 430 S.E.2d 371 (Ga. App. 1993) (holding that § 60 permits plaintiffs' attorneys to make *ex parte* communications).

railroad practices that were then commonly used to prevent rail employees and their representatives from obtaining access to needed information, not to give one side an advantage by exempting it from the general rules of conduct that govern litigation. Moreover, no incompatibility exists between state ethical rules prohibiting *ex parte* contacts and the purposes of § 60. As a number of courts have recognized, plaintiffs' counsel may avail themselves of the established discovery process to obtain the information needed to prepare a case.

Failure to resolve the question presented by this case will have a significant impact on the railroad industry, which defends several thousand FELA suits every year. Contacting rail employees without the consent of railroad counsel is commonly attempted by FELA plaintiffs' counsel, and the lower courts remain divided on whether this practice is sanctioned by FELA. The inability of a railroad to prevent *ex parte* communications makes it exceedingly difficult for its counsel to prepare an effective defense. Only a definitive ruling by this Court on the preemptive scope of § 60 will clarify the rules of litigation in FELA cases.

ARGUMENT

I. THIS COURT SHOULD RULE ON THE PREEMPTIVE EFFECT OF SECTION 60 OF FELA TO CLEAR UP THE CONFUSION THAT EXISTS IN THE LOWER COURTS

A. Section 60 of FELA Does Not Preempt State Rules Prohibiting *Ex Parte* Communications

The court below considers that the standards for ethical conduct by attorneys in FELA cases differ from those governing attorneys in all other cases. It would permit FELA plaintiffs' attorneys to make *ex parte* contacts with employees of a railroad defendant on the grounds that § 60 of FELA preempts any state ethical rules barring

ex parte contacts.[5] Section 60, enacted as part of the 1939 amendments to FELA, prohibits "[a]ny contract, rule, regulation, or device whatsoever, the purpose, intent or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee . . ."[6]

The broad preemptive sweep given § 60 by the court below is unwarranted. The legislative history makes clear that Congress' intent in enacting § 60 was to eliminate certain railroad practices that were then commonly used to prevent rail employees and their representatives from obtaining access to needed information.[7] In outlawing any "contract, rule, regulation or device", § 60 refers to any railroad scheme or policy designed to thwart communication by employees, not a state rule or law of general applicability.[8]

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[5] Here, Petitioner was attempting to enforce Rule 4.2 of the Illinois Rules of Professional Conduct. This rule, like those adopted by most states, prohibits a lawyer from communicating with a party the lawyer knows to be represented by another lawyer without obtaining the consent of the other lawyer.

[6] If the ruling below is correct, then railroad counsel would, in theory, be unrestrained by ethical rules from seeking *ex parte* contacts with an FELA plaintiff since § 60 is neutral on its face with respect to who is covered.

[7] ". . . a substantial number of the railroads subject to the Federal Employers' Liability Act have promulgated rules which prohibit employees from giving information concerning an accident to anyone excepting certain specified company officials and claim agents. The purpose of the amendment under consideration is to prohibit the enforcement of such rules . . ." S. Rep. No. 76-661, at 5 (1939). *See Sheet Metal Workers Int'l.* v. *Burlington Northern R.R.*, 736 F.2d 1250 (8th Cir. 1984) ("§ 60 was designed to prohibit the enforcement of company rules inhibiting the free flow of accident information . . . ." *Id.* at 1252.)

[8] *See Tucker; Branham; Queensberry. Cf. Nordgren* v. *Burlington Northern R.R.*, 101 F.3d 1246, 1251 (8th Cir. 1996) holding

The goal of § 60 was to level the playing field between railroads and their counsel and employees and their counsel, not to give one side an advantage by exempting it from the general rules of conduct that govern litigation. "In relation to the investigation of facts, upon which claims for injuries are based, humanity and justice demand that injured railroad men be accorded as much freedom of action as their employers enjoy." S. Rep. No. 76-661, at 5 (1939).

There is nothing in § 60 which requires a special exception to the general rules governing attorney conduct. No incompatibility exists between state ethical rules prohibiting *ex parte* contacts and the purposes of § 60. State ethics rules merely restrict certain practices by attorneys deemed, with near universality, to be unethical.[9] They do not prevent a party from obtaining evidence necessary to prepare its case, rather, they only require that in doing so generally accepted standards of conduct be followed. As a number of courts have recognized, plaintiffs' counsel may avail themselves of the established discovery process, set forth in both the federal and state rules of civil procedure, for obtaining information needed to prepare a case.[10]

This Court has held that preemption should be found only when it is the clear intent of Congress, or where

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that the term "any device whatsoever" as used in sections 55 and 60 of FELA refers only to "any other creative agreements or arrangements the railroad might come up with . . . ."

[9] The cannons of ethics are the "product of experience gained over the decades, even the centuries, and are designed to establish and assure standards of simple fairness and moral and ethical reponsibility on the part of counsel in furtherance of the ends of justice." *In Re FRM Corp.*, 430 F. Supp. 1108, 1110 (S.D. W.Va. 1977).

[10] "Absent consent of the defendant railroad's counsel, the desired information must be accessed through normal discovery methods, such as depositions or other statements taken in the presence of defendant's counsel." *Queensberry*, 157 F.R.D. at 25.

there is an irreconcilable conflict between the federal and state law.[11] Where, as here, an area traditionally governed by state law is involved, courts should be particularly reluctant to find preemption.[12] The holding of the court below, that in enacting § 60 Congress intended to nullify state ethical rules, creating a special exemption for one class of litigants, is inconsistent with this Court's teaching on preemption, and should be reviewed.

B. The Confusion Over The Scope Of Section 60 Has A Substantial Adverse Impact On Railroads' Ability To Defend FELA Lawsuits

Corporate defendants, such as railroads, have a strong interest in the evenhanded enforcement of state ethical rules on *ex parte* communications. The comments to the American Bar Association's Model Rule of Professional Conduct 4.2, upon which many state rules regarding *ex parte* communications are based, describe certain classes of corporate employees with whom *ex parte* communications are prohibited.[13] As one commentator has summarized, "those who can hurt or bind the organization *with respect to the matter at hand* are off limits except for formal discovery or except with the consent of the entity's lawyer." G. HAZARD & W. HODES, 2 THE LAW OF LAWYERING—A HANDBOOK ON THE MODEL RULES OF PRO-

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[11] *Gade* v. *National Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 96 (1992); *CSX Transp. Inc.* v. *Easterwood*, 507 U.S. 658, 663 (1993).

[12] *Easterwood supra* at 664.

[13] When a party is an organization, *ex parte* communications are prohibited with (1) persons having managerial responsibility, (2) any other person whose acts or omission in connection with the matter may be imputed to the organization for the purpose of civil or criminal liability, or (3) any person whose statement may constitute an admission on the part of the organization. AMERICAN BAR ASSOCIATION, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 4.2, at 391 (3d ed. 1996).

FESSIONAL CONDUCT, § 4.2:105 (2d ed., 1997 supplement). Depending on the facts of the case, numerous railroad employees might fall within this class and thus, within the prohibition on *ex parte* communications.[14]

The issue at stake in this case involves far more than an esoteric debate over legal ethics. Ethical constraints against *ex parte* communications are very important in FELA litigation. It is not unusual for several employees to have witnessed, or even played a role in, a workplace accident. Thus, the conduct, or even the perception of events, of a fellow employee could be integral to an FELA plaintiff's theory of liability or to a railroad's defense. The inability of a railroad to prevent *ex parte* communications with its employees can materially effect its litigation position, and make it exceedingly difficult for its counsel to prepare an effective defense.

Not only does the issue in this case have a serious impact on FELA litigation, it recurs with great frequency. FELA litigation is a daily fact of life for large railroads. With over 5,000 FELA suits being filed annually, railroad claims and law departments, and outside defense counsel, are continually involved in the investigation and discovery process, as are counsel for the plaintiffs.

Contacting rail employees without the consent of railroad counsel is commonly attempted by FELA plaintiffs'

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[14] The Federal Rules of Evidence take out of the hearsay rule altogether statements made by most organization employees, when the statements are to be introduced against the interests of the organization.

Rule 801(d)(2)(D) reads as follows:

> (d) Statements which are not hearsay. A statement is not hearsay if—
>
> (2) Admission by party-opponent. The statement is offered against a party and is * * * (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship * * *

counsel. In order to avoid prejudice to their clients, railroad attorneys must repeatedly litigate the issue of whether their opposing counsel are bound by the same ethical rules by which they must abide.[15] The issue is usually resolved only with respect to the particular case, leaving the same scenario to play itself out again.[16] Only a definitive ruling by this Court on the preemptive scope of § 60 will end this frequent resort to the courts, and clarify the rules of litigation in FELA cases.

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[15] *See e.g.*, court orders in *Johnson* v. *Illinois Central R.R.*, No. C95-0001 P(J) (W.D. Ky. Mar. 7, 1996); *Crane* v. *Paducah & Louisville Ry.*, No. C-95-0003-P(J) (W.D. Ky. May 23, 1995); *Munson* v. *Wisconsin Central Ltd.*, No. 93-C-0694 (E.D. Wis. Mar. 24, 1994); *Gross* v. *Illinois Central R.R.*, No. 3:92CV075-D-D (N.D. Miss. Nov. 19, 1992).

[16] The injunction issued against the railroad in the case below purports to authorize *ex parte* communications in all FELA cases in which Respondent's counsel represent the plaintiff. However, as Petitioners point out, other jurisdictions where these representations may occur take a contrary view of the preemptive effect of § 60. Pet. Br. at 23. If the court's injunction has *res judicata* effect, counsel here would have perquisites beyond those enjoyed by attorneys practicing in their home venue. The purported broad scope of the injunction here underscores the confusion that surrounds this issue and the need for a uniform rule.

CONCLUSION

On the basis of the foregoing, *amicus curiae* respectfully submits that the petition for a writ of *certiorari* to review the judgment of the Appellate Court of Illinois in this case be granted.

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